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JOHN T. FEY, Clerk

IN THE

# Supreme Court of the United States

**October Term, 1956**

No. 843

WILLIAM R. MESTICE,

*Petitioner,*

*against*

BOROUGH OF NEPTUNE CITY, a Municipal Corporation of the State of New Jersey, and William R. Taylor,

*Respondents.*

## STATUTORY PROVISIONS TO SUSTAIN APPELLATE JURISDICTION

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*Petitioner, Pro Se,*
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Newark, New Jersey.

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IN THE

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No. .....

WILLIAM R. MESTICE,

*Petitioner,*

*against*

BOROUGH OF NEPTUNE CITY, a Municipal Corporation of the State of New Jersey, and William R. Taylor,

*Respondents.*

## STATUTORY PROVISIONS TO SUSTAIN APPELLATE JURISDICTION

*To: The Honorable Chief Justice, and Associate Justices of the Supreme Court of the United States:*

MAY IT PLEASE YOUR HONORS:

1. The Petitioner-appellant, above named, prays that this Honorable Court, may grant him his day in Court, and be heard before an impartial jury, who may determine the facts in the above matter, and dispose the case as it may be best in furtherance of justice, without prejudice.

## Opinions Below

2. There were no legal, nor equitable opinions in the Courts of New Jersey, and disposed of the matter by vague informalities of procedure, and denied the petitioner his legal right to be heard in open Court. Likewise, in the United States District Court, and in the United States Court of Appeals, For the Third Circuit, there was no legal, nor equitable solution, and the petitioner has been denied his day in Court, which it may amount as violative of the due process clause of the Fourteenth Amendment, and the Equal Protection of Laws of the Federal and State Constitutions.

## Jurisdiction

3. The judgment in the respondents' Magistrate Court was entered on October 1, 1953, without a jury, and sentence of $200.00 was imposed against the appellant on October 6th, 1953, for constructing, upon their approval, a multiple family dwelling, in a one family residential zone, as being amended around March 1953; the premises are about forty years old. Appellant was denied his day in the courts of New Jersey, and, likewise, the Supreme Court of New Jersey, denied the appellant a Petition for Certification, on March 25th, 1955.

4. A verified complaint, and demand for trial by jury was denied, and dismissed with prejudice; and likewise the appeal, and petition for re-hearing was denied, and dismissed.

Thus, there are no further remedies available in the Courts below, and in the Courts of New Jersey, and the

jurisdiction of this Court is invoked under the various laws, rules, and amendments set forth in the Notice of Appeal from the United States Court of Appeals for the Third Circuit to this Court.

## Questions Presented

5. (a) This action was brought by the respondents against the appellant, in the Magistrate Court of the herein respondents, by the issuance of a complaint, and warrant for his arrest, and released under a $5,000.00 bond, upon the completion of the repairs, and alterations, as approved by them. Was such a procedure proper? Was there any crime committed? Are the respondents libelous?

6. Appellant was convicted, and sentenced to pay a fine of $200.00, by their Magistrate, who denied the trial by jury, based upon the respondents' Ordinance No. 21 on "Enforcement and Penalties" which provides that a violator of any ordinance, makes him subject to a $200.00 fine, or 30 days in jail, or both. Is such an ordinance legal, or *ultra vires?* Is it unconstitutional where such an ordinance further provides that if continued, every day shall be so regarded, and punished as a separate offense daily? Are said enforcements *ultra vires*, unconstitutional, and libelous per se? Does such a procedure, and enforcement of penalties amount to a denial of due process to petitioner?

7. The appellant did appeal from the respondents' Magistrate Court, to the County Court of Monmouth, N. J., and after being denied a hearing, started another action in the Superior Court, and its Judge, arbitrarily, and arrogantly, dismissed my complaint, who later on, on account

of his impudence while on the Bench, he was relieved by the N. J. Governor. Does such a treatment amount to a denial of one's Civil Rights, and of equal protection of laws?

8. The appeal was carried to the Superior Court, Appellate Division, and its presiding Judge, did advise the respondents' attorney to prepare some kind of affidavit so that my appeal would have been dismissed. Does it amount to unfair denial of due process of law, and denial of the equal protection of one's civil rights?

9. The application of appeal was carried before the Supreme Court of New Jersey, and without justification, or opinion, certification was denied, with complete disregard to the unnecessary hardship imposed upon the petitioner, the abuses of process in the courts below, and upon the unconstitutional abuse on the respondents' Ordinance No. 21, "Enforcement And Penalties". Was such denial proper, or should certification been granted, and give the petitioner an opportunity to submit his grievances before a jury, and modify, or abrogate said respondents' Ordinance, as being *ultra vires*, unconstitutional, and violative of the 14th Amendment to the U. S. Constitution?

10. The petitioner after being denied his day in the Courts of New Jersey, he complained in the National Federal Courts, and since his prayers to be heard before a jury, have been likewise evasively denied, for want of jurisdiction, or otherwise, its judgments of refusals, clearly indicate that the petitioner's position is precarious, and having no other resource, hereby invokes the Constitutional Rights, and in fact, has the petitioner been denied the equal protection of law, and of the due process?

## Constitutional Provisions Involved

11. Petitioner contends that the aforesaid judgments, or decision, or the denial of his day in Court, amount to a denial of due process and equal protection of law, as to civil, property, legal, and equitable rights, as guaranteed to it by Article XIV, Section 1, of the Federal Constitution, and of those as more or less set forth in the "Notice of Appeal from the U. S. Circuit Court of Appeals for the Third Circuit, to the Supreme Court of the United States".

## Statement

12. The petitioner, above named, is the owner in fee of certain lands and premises known as 120 Ridge Avenue, Neptune City, County of Monmouth, State of New Jersey.

13. The abstract of title shows that the said premises, were in existence since or about 40 years, long before the zoning ordinance was amended; adopted in or about March 26, 1953.

14. The petitioner, in or about 1946, submitted plans for major alterations, and remodernization, which were duly passed by the Board of Adjustment, Mayor and Council, signed by the Chairman and by its building inspector.

15. That no notice of work-stoppage was ever served upon petitioner, when the respondents instituted a criminal action with a Complaint, and Warrant of Arrest, which falsity deprived the petitioner of his liberty, of a fine of $200.00, and the peaceful enjoyment of his right to his real property.

16. That said premises were ready for occupancy since or about June, 1949, at which time the petitioner demanded of respondents' Inspector for a certificate of occupancy, and paid a fee of $2.00, but it was never issued, whereupon, the petitioner rented 2 of his apartments on the first floor.

17. Thereupon, the respondents, without any notice, nor warning, issued a Criminal Complaint, and a Warrant of Arrest, for renting the said apartments, who having been annoyed, by the said respondents, they moved out, and now, the appellant HAS AN EMPTY BUILDING, WITHOUT ANY INCOME, and facing the payments for taxes, mortgage, and other operating expenses, and vandalism.

18. Section 8.

"Non-Conforming Building, or Uses

a) Any nonconforming use of structure existing at the time of passing of ordinance, may be continued upon the lot, or in the building so occupied, and any such structure may be restored, or repaired, in the event of partial destruction thereof, providing such destruction shall not exceed 50% percent of the assessed valuation."

Apparently, since the premises have been in existence for about 40 years, Section 3a, as amended does not apply to the case at bar, as to non conformity of use. The premises, however, were completed under the constant observation of respondents' inspector, and approved plans.

19. The petitioner has further invoked the statutory provision R. S. 40:55-39 (c) in its application to prevent unnecessary hardship, molestations, and persecutions by

means of abuses of process, false arrests, and defamatory publications. There appears to be a palpable abuse of power, thus created defamatory publications, which are libelous, per se, and hereby invokes the principles applied by Oliphant, J. in the case of *Earl* v. *Winnie*, Supreme Court of New Jersey, reported in the Law Journal, Dec. 31, 1953; 76 N. J. L. J. Index page 451.

20. The case of *Kohr Bros.* v. *Atlantic City*, 149 Atl. 34, 104 N. J. L. 468, the Court said:

> "That an attempt by a Municipality to create a crime, in violation of an Ordinance, is void.
>
> That a municipality may provide imprisonment for a non payment of a fine; it has been held that under the power to punish by fine, or by imprisonment, the corporation has no power to enforce the collection of a fine by imprisonment, or to imprison any one for the non-payment of fine." *Brieswick* v. *Brieswick*, 51 Ga. 639, 21 Am. R. 240.

21. In *State* v. *New Brunswick*, 2 N. J. L. J. 240, it was held:

> "That the authority of the corporation to impose fines, does not authorize it to provide both fine, and imprisonment, and ordinance prescribing punishment by fine or imprisonment, or both, violates a charter provision to the effect that violations of the municipal ordinance may be punished either by fine, or imprisonment."

22. That the respondents' Ordinance No. 21, on Enforcement and Penalties says:

> "* * * any violation of the ordinance shall exist, shall for each and every violation, upon conviction,

be imprisoned in the Monmouth County Jail, for a period not exceeding 30 days, or be fined not exceeding Two Hundred ($200.00) Dollars, or both.

Each day that a violation is permitted to exist, shall constitute a separate offense."

23. This Court may take judicial notice that the above ordinance of the respondents, is a violation of R. S. 55:11-1, which says:

"Liability of Every Violator to Penalty

Every person who shall violate, or assist in the violation of any provisions of this sub-title, shall be subject to a penalty of $100.00, if such violation be willful, or to a penalty of $50.00, if such violation be not willful."

And says in R. S. 55:11-6:

"* * * that no warrant shall issue against any freeholder, unless affidavit shall also first be made and that such freeholder is about to abscond from this State."

24. It has further been held, that where proceedings are civil in nature, the rules of civil procedure should prevail, and a municipality may proceed by writ of prohibition, when ordinances are violated, and by jury. *Weinberg* v. *August*, 116 Ill. App. 423; *People* v. *Ferrine*, 2 Just. L. R. 254 (Pa., C. J. S. 692):

"It is proper to admit the entire ordinance where such practice will aid the jury, in a fair understanding of the particular section, forming the basis of prosecution."

*State* v. *Haber*, 41 A. 2nd 326; 132 N. J. L. 507, held:

> "Where proceedings are civil in their nature, the trial should be conducted according to the rules governing civil actions. * * * The right to trial by jury, in a proceeding for a violation of a municipal ordinance, may be conferred by Statute. Question of law and fact: In a proceeding to enforce liability for violation of a municipal ordinance, questions of facts are for the jury, or other trier of facts, and questions of law are for the court. * * * That on appeal from the initial court, trying violations of municipal ordinances, the proceedings are triable de novo, in which case, the proceedings stand as though no judgment has been rendered in the lower court."

THEREFORE, it appearing that the respondent's court had no power to create a criminal action by the issuance of a "Complaint and Warrant of Arrest", by its abuse of false process, they have imposed an unnecessary hardship upon the petitioner, invaded his property rights, and his civil rights as well, and thereby suffered defamation, humiliation, and ridicule in the community. Does such practice amount to a denial of due process? And may it be considered as libelous per se? Has there been an unwarranted interference with the right, and peaceful enjoyment of private property?

25. That the above said petitioner's premises, are recorded as industrial by the Asbury Park Board of Trade, dated as far back to January 30, 1891, and in Book of Deeds for Monmouth County, Book 478, Page 485. That said premises have been in existence for about 40 years, and subject to an Act of the Legislature of New Jersey, R. S. 40:55-51:

"Existing Zoning Ordinance Saved

Any ordinance adopted by a municipality prior to April 3, 1928 (1928) for any purposes set forth in this Article, shall continue in effect as if adopted under the provisions of this article . . . shall remain in force . . ."

R. S. 40: 55-48:

"Non Conforming Building and Uses; Continuance of

"Any non conforming use or structure existing at the time of passage of an ordinance may be continued upon the lot, or in the building so occupied, and any structure may be restored, or repaired in the event of partial destruction thereof."

THEREFORE, has the petitioner any vested legal rights? Are the respondents liable for their abuses of processes? Has the petitioner been denied the equal protection of law? Has there been a denial of due process and a denial of a jury hearing? Does the respondents' Ordinance No. 21, on Enforcement, and Penalty, presents a constitutional question as *ultra vires,* or otherwise?

26. *City of Omaha* v. *Glissman,* 151 Neb. 895, N. W. 2nd 828 the Court said:

"A zoning ordinance may not operate retroactively to deprive a property owner of his previously vested rights, that is, a zoning ordinance cannot deprive the owner of use to which his property was put before the enactment of the ordinance." (Pages 833, 834, by Justice Wenke.)

*Baker* v. *Sommerville,* 138 Neb. 466; 293 N. W. 326

> "A vested right was held to exist after permit had been issued and substantial work done thereunder, a municipal ordinance cannot operate retroactively to deprive a property owner of previously vested rights.
>
> Where city zoning ordinance provision requiring floor space of one story residents to contain 2,000 sq. ft. was extended, by subsequent change in ordinance to lot after purchasers had purchased it, and had procured their building permit and invested $5,600.00, in the building of a home thereon, they acquired vested rights, which could not be affected by the (new) ordinance."

27. That the doctrine of estoppel is enforceable against a municipality, in zoning or building permit cases, and in equitable cases as well, as in the case at bar: *City of West Palm Beach* v. *Edw. U. Roddy Corp.* (Fla. 1950), 43 So. 2d 709, it held:

> "Evidence justified decree enjoining city from enforcing zoning ordinance classifying a residential property, property formerly classified as industrial property."

Under Title 28-1343, Civil Rights; To Recover damages for injury to his person, or property (3)

> "To redress the deprivation under color of any state law, statute, ordinance, etc. of any right, privilege, or immunity, secured by the Constitution of U. S., or by any act of Congress, providing for equal rights of citizens or of all persons within the juristion of United States."

## Reasons to Sustain Jurisdiction

### (a) Due Process

28. Petitioner maintains that a denial of a hearing by jury, or otherwise, in open court, under the peculiar abuses of process, deprivation of private property vested rights, defamation, humiliation, and a denial of his day in Court, as provided by law, amounts to a denial of due process.

29. Under Title 28 U. S. C. A. 1331, an aggrieved party, having exhausted all his resources in the State Courts may proceed in the National Federal Courts for relief.

30. Under Title 28 U. S. C. A. 2106, an aggrieved party may resort to the National Federal Courts, and demand to set aside, modify or vacate, or reverse, or remand the case to the court, and direct to enter such an appropriate judgment, or remedial right, be it legal, equitable, punitive or exemplary as to damages.

31. Under Title 28 U. S. C. A. 1343, an aggrieved party, having been abused by an unwarranted process, in violation of his civil rights, may recover damages for injury to his personal integrity, liberty, and property, in vindication thereof, may resort to the National Federal Courts.

32. Under Title 42 U. S. C. A. 1981, where an aggrieved party has been deprived of civil rights, and the equal rights under the law, and thereby justice being obstructed, such a party may file a complaint in the National Federal Courts.

33. Under Title 28 U. S. C. A. 2284, an aggrieved party may demand a Three-Judge convenence in aid of jurisdiction to prevent irreparable damages, and demand for temporary, or permanent restraining order? Or by mandamus?

34. Under Title 28 U. S. C. A. 1257, an aggrieved party, whose interest have been invaded, and his legal and equitable rights have been denied, and deprived him to be heard in open court, or before an impartial jury in the state courts, said aggrieved party may file a complaint in the National Federal Courts, or in the alternative, may request for certiorari, and directed to be heard on the merits, before an impartial jury.

35. Under Title 42 U. S. C. A. 1985, an aggrieved party may resort to the National Federal Courts and file a complaint for having been deprived of his legal and equitable rights, on the ground that the ordinance, or the ordinances of a municipality were *ultra vires*, and repugnant to statutory provisions enacted by the State, and by the Federal Constitution of due process clause.

36. Under Federal Procedure (Vol. 4, 2nd Ed. by Barrow and Holztoff) Ph. 1321, and Ph. 1208, the respondents' procedure having been abusive, and repugnant to basic rules of Statute of the State, and Constitutional Amendments of the United States, and the ordinance it appearing to be *ultra vires*, and it having brought to the party in interest humiliation and defamation, said party may ultimately bring an action in the National Federal Courts for relief, in the nature of libel, and demand a jury hearing, and demand examplary damages, and punitive damages?

**(b) Equal Protection**

37. Under Title 42 U. S. C. A. 1983, the aggrieved party, being deprived of his civil rights under color of a State law, Statute, Ordinance, Regulation, Custom or Usage, of any right, privilege, or immunity secured by the

Federal Constitution or of any Act of Congress which provide of equal rights of citizens or of all persons under its jurisdiction of United States, said aggrieved party may resort to the National Federal Courts, and demand a reviewal of proceedings, and if necessary a proper hearing. where the equal protection of law has been denied.

38. Under Title 28 U. S. C. A. 2201, an aggrieved party may demand remedial damages by filing appropriate pleadings in the National Federal Courts, to have declared the rights, and legal relations of the interested party, and have the full force and effect of a final judgment, and which may be reviewable as such. The respondents have wrongfully acted *ultra vires,* not being authorized by law, nor within its power, it being of repugnance to the Constitution of the United States.

39. Therefore, petitioner demands for injunction as against the enforcement of penalty, as in violation of the respondents' ordinance, as to its unconstitutionality under the Constitution of the United States, as to its Statutory construction, petitioner demands that said type of enforcement be curbed, abrogated, and be temporarily, or permanently restrained.

40. It is, therefore, respectfully submitted that this Court's jurisdiction is hereby invoked. That the rulings of the courts below were so abused, disregarded, or erred, as to bring the matter within the jurisdictional provisions relied on, in that the Supreme Court of the State of New Jersey, erred in holding, and deciding against the petitioner, by refusing certification thereto, which, then and there, did constitute a deprivation of said property, without

due process of law, and did deny the appellant the equal protection of the laws within the meaning of Section 1, of Article XIV of the Amendments to the Constitution of the United States.

## CONCLUSION

41. Petitioner holds (a) That in allowing the herein respondents a judicial enforcement and penalty, and unduly restrictions, the State of New Jersey has denied the petitioner the equal protection of the laws, and that, therefore, the action of the state cannot stand, whose courts' decision has denied petitioner the equal protection of the law guaranteed by the Fourteenth Amendment to the Federal Constitution. It is submitted that this Court should exercise its power to correct so palpable injustice, to grant the petitioner his day in Court, and to grant a temporary injunction, so that he may rent his premises, and to restrain the respondents of the far reaching consequences caused by abuses of process, as established in its court, and disregarded by the other courts below. WHEREFORE, it is respectfully submitted that his petition of jurisdiction for the prayers heretofore set forth, and for the reasons thereof propounded, should be granted, as indicated, and invoked.

WILLIAM R. MESTICE,
*Petitioner, Pro Se,*
247 Broadway,
Newark, New Jersey.

Dated: February 23, 1957.

FILED
APR 12 19
JOHN T. FEY,

IN THE

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OCTOBER TERM, 1956.

No. 843.

WILLIAM R. MESTICE,

*Appellant,*

*v.*

BOROUGH OF NEPTUNE CITY, a Municipal Corporation of the State of New Jersey, and WILLIAM R. TAYLOR,

*Appellees.*

*ON APPEAL FROM JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.*

## APPELLEES' MOTION TO DISMISS APPEAL.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1956

No. 843.

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WILLIAM R. MESTICE,

Appellant,

*v.*

BOROUGH OF NEPTUNE CITY, a Municipal Corporation of the State of New Jersey, and WILLIAM R. TAYLOR,

Appellees.

## APPELLEES' MOTION TO DISMISS APPEAL.

The appellees, Borough of Neptune City, a municipal corporation of the State of New Jersey, and William R. Taylor, respectfully move to dismiss the appeal of William R. Mestice, the appellant (designated as Petitioner), upon the following grounds:

I. The appeal is not within the jurisdiction of this court.

(1) An appeal from the court of appeals to this court may be taken only "when permitted by law." Rule 10, paragraph 1. The present appeal is not permitted by law.

28 U. S. C. 1252;

28 U. S. C. 1254(2).

(2) The present appeal, insofar as it pertains to the judgment by the Supreme Court of New Jersey

(*vide* paragraph 1 of the Notice of Appeal), is fatally defective in two jurisdictional respects:

(a) It is not permitted by law.

28 U. S. C. 1257.

(b) It is out of time.

28 U. S. C. 2101.

(3) The present appeal, insofar as it pertains to the orders and judgment in the United States District Court for the District of New Jersey, is fatally defective, in that it is not permitted by law.

18 U. S. C. 1252.

II. Appellant's appeal from the state court does not present a substantial federal question.

III. The judgments in the state courts rest on an adequate non-federal basis.

IV. The appeal was not taken in conformity with the following rules of this court dealing with the jurisdictional statement:

(1) Rule 15(a). Appellant's purported jurisdictional statement (designated as "Statutory Provisions to Sustain Appellate Jurisdiction") does not contain a reference to the following reports of the opinions delivered in the courts below:

*Neptune City* v. *Mestice*, 31 N. J. Super. 6 (App. Div. 1954). *Certification denied*, 18 N. J. 105 (March 28, 1955);

*Mestice* v. *Board of Adjustment of Neptune City*, 35 N. J. Super. 313 (App. Div. May 11, 1955).

(2) Rules 15(a) and (h). A copy of the opinions delivered in the courts below (appended hereto) was not appended to appellant's statement.

(3) Rule 15(i). A copy of the orders and judgments in the state and federal courts (appended hereto) was not appended to appellant's statement.

(4) Rule 15, paragraph 1(b)(ii). The jurisdictional statement does not contain the dates the notice of appeal was filed, and the courts in which it was filed.

JOSEPH R. MEGILL,
Attorney for Appellees.

Of Counsel:
DAVID GOLDSTEIN.

# APPENDIX.

## (Opinion in 31 N. J. Super. 6)

## Superior Court of New Jersey

APPELLATE DIVISION

BOROUGH OF NEPTUNE CITY, a municipal corporation of the State of New Jersey,

Respondent,

*v.*

WILLIAM R. MESTICE,

Appellant.

Argued May 24, 1954 — Decided June 2, 1954.

Before JUDGES EASTWOOD, JAYNE and FRANCIS.

MR. WILLIAM R. MESTICE, appellant, *pro se.*

MR. JOSEPH R. MEGILL argued the cause for respondent.

The opinion of the court was delivered by
JAYNE, *J. A. D.*

The defendant was evidently found guilty by the magistrate of the Municipal Court of the Borough of Neptune City on October 1, 1953 of violating the zoning ordinance of that municipality and directed to attend a session of that court to be held on the evening of October 6, 1953 at which the penalty for the violation would be determined.

The record before us contains the following memorial of the proceedings on October 6, 1953:

"Ordered and adjudged that the defendant is guilty as of October 1, 1953 of said offense as charged in the complaint and is convicted thereof, and is sentenced on October 6, 1953 to a fine of Two Hundred ($200.00) Dollars."

On October 7, 1953 the defendant filed a petition addressed to the Monmouth County Court in which he prayed, *inter alia,* for the following relief:

"That the judgment and penalty, as inflicted by the Court below, be set aside, vacated, and for nothing holden, for want of jurisdiction, since the above matter is purely a civil matter and not criminal, and reversed * * * and that a trial *de novo* be granted to the herein appellant * * *."

On October 8, 1953 the judge of the County Court entered an order:

"That the judgment and sentence as finally entered on the 6th day of October, 1953, is hereby arrested, set aside and for nothing holden, and the matter to be heard *de novo* in this Court as a Civil Action for the purpose thereof."

On October 19, 1953 the defendant filed in the County Court a notice of appeal, dated October 5, 1953 and said by the borough attorney to have been served upon him on the morning of October 6, 1953 before the evening session of the municipal court, from his conviction "on October 1, 1953."

On October 23, 1953 in response to a motion made by the borough attorney the judge of the County Court entered an order dismissing the appeal.

The defendant then gave written notice dated October 23, 1953 and filed on October 29, 1953 to the borough attor-

ney of his intention to apply on November 6, 1953 to the County Court for an order:

> "Restoring the appeal, and the order as entered on the 8th day of October, 1953 (which seems also to have been vacated by the County Court on October 23, 1953) * * * and I shall further ask the Court to set down a day for a pretrial conference and a hearing by jury as provided by law * * *."

On November 6, 1953 an order was entered in the County Court denying the defendant's application. On December 14, 1953 the defendant served and we shall assume thereafter filed a notice that he appeals to the Appellate Division from:

> "* * * the judgment of conviction entered in the above matter on October 1, 1953, and as per sentence imposed for $200 on October 6, 1953 and from all orders, and related procedures, and the final order entered on the 11th day of December, 1953 which denied the application for a trial *de novo* * * *."

The foregoing is an up-to-date chronological summary of the movements in this case. We may pause to state that although the defendant is not a member of the bar, he has conducted *pro se* considerable litigation in our courts from which progressively increasing experience he has undoubtedly derived a familiarity with our procedural rules.

We shall begin our review near the beginning and recognize the fundamentally decisive question to be whether the defendant filed his notice of appeal from the judgment of conviction in the municipal court to the County Court within the time prescribed by the rules.

(1) "The *sine qua non* of the jurisdiction of an appellate court is the filing of an appeal or writ of error within the time limited." *State* v. *Janiec,* 6 N. J. 608, 613 (1951).

See also, *In re Pfizer's Estate*, 6 N. J. 233 (1951); *Weaver* v. *Township of North Bergen*, 6 N. J. 475 (1951).

Suppose we assume that the final judgment of conviction was entered on October 6, 1953 and that the notice of appeal was served upon the attorney of the respondent prematurely (*cf. In re Kershner*, 9 N. J. 471, 474 (1952); *State* v. *Milton*, 27 N. J. Super. 423 (App. Div. 1953) ), was the filing of the notice of appeal on October 19, 1953 within the time limited by the applicable rule?

We consult R. R. 1:3-1 which in subdivision (a) specifies a period of three months from final judgments in criminal causes in the trial divisions of the Superior Court and County Courts and in subdivision (c) limits the period to ten days from final judgments of municipal courts.

Our reflections, although not projected by the appellant, have encircled the declaration of the Supreme Court in *City of Absecon* v. *Vettese*, 13 N. J. 581 (1953) on *page* 584, that: "Since the adoption of our new court rules in 1948 it has become well established that, for procedural purposes, conviction for violation of a municipal ordinance is to be treated as a criminal cause." *Vide*, also, *City of Newark* v. *Pulverman*, 12 N. J. 105, 114 (1953).

We necessarily trace the import of R. R. 8:11-1 to R. R. 3:10-5 and then to R. R. 1:3-1. R. R. 3:10-5 supplanted former Rule 2:11. *Vide, City of Newark* v. *Pulverman, supra.* Is the time within which the defendant may appeal from a final judgment of conviction of the violation of a municipal zoning ordinance prescribed by subdivision (a) or by subdivision (c) of R. R. 1:3-1 in view of the decisions in *City of Newark* v. *Pulverman, supra,* and in *City of Absecon* v. *Vettese, supra,* in the later of which it was stated that "The defendant's conviction was governed by what is now R. R. 1:3-1 (a) and his appeal was timely."

It is immediately noticeable that subdivision (a) of R. R. 1:3-1 pertains to appeals taken from "final judgments in

criminal causes in the trial divisions of the Superior Court and county courts." Equally noticeable is the circumstance that the appeals with which the Supreme Court was concerned in the *City of Newark* v. *Pulverman* and *City of Absecon* v. *Vettese* cases were prosecuted from the judgments rendered in the county courts.

Counsel for the respondent also invites our attention to the apparent failure of the defendant to embody in his notice of appeal all of the information required by R. R. 3:10-3.

(2) We conclude that subdivision (c) of R. R. 1:3-1 limited the period of time to ten days within which the defendant could appeal from his conviction in the muncipal court to the County Court. The notice of appeal was filed beyond that period of time; the County Court lacked appellate jurisdiction of the action and the abortive appeal was therefore properly dismissed. The present appeal to this court must likewise be dismissed.

## Order Denying Petition for Rehearing.

(Filed June 22, 1954.)

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

Docket No. A-208-53.

| | |
|---|---|
| BOROUGH OF NEPTUNE CITY, a municipal corporation of the State of New Jersey,<br>Respondent,<br>*vs.*<br>WILLIAM R. MESTICE,<br>Appellant. | Criminal Action.<br>Order Denying Petition for Rehearing. |

The Court having considered the Petition for Rehearing filed in this cause by the defendant-appellant, and being of the opinion that the said Petition is without merit,

It is, on this 21st day of June 1954, ORDERED, that the Petition for Rehearing be and the same is hereby denied.

For the Court,

HOWARD EASTWOOD,
S. J. A. D.

## Mandate on Dismissal.

(Filed June 2, 1954.)

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Appeal Docket No. A-208-53.

| | |
|---|---|
| BOROUGH OF NEPTUNE CITY, a municipal corporation of the State of New Jersey,<br>Respondent,<br>*vs.*<br>WILLIAM R. MESTICE,<br>Appellant. | Civil Action.<br>On Appeal.<br>Mandate on Dismissal. |

This cause having been duly argued before this Court by William R. Mestice, pro se, and Joseph R. Megill, counsel for the respondent, and the Court having considered the same,

It is hereupon ordered and adjudged that the appeal from the judgment of the said Monmouth County Court is dismissed with costs; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless a Notice of Appeal to the Supreme Court or a Notice of Petition for certification has been filed or is pending, or unless otherwise ordered by this Court and that the record be remitted to the Monmouth County Court to be there proceeded with in accordance with the rules and practice relating to that Court, consistent with the opinion of this Court.

WITNESS the Senior Judge of the Part, Superior Court of New Jersey, Appellate Division, at Trenton on the 2nd day of June, 1954.

I. GRANT SCOTT,
Clerk of the Superior Court.

## Order Denying Petition.

(Filed March 28, 1955.)

SUPREME COURT OF NEW JERSEY
No. 1597.

| | |
|---|---|
| BOROUGH OF NEPTUNE CITY,<br>Plaintiff-Respondent,<br>*vs.*<br>WILLIAM R. MESTICE,<br>Defendant-Petitioner. | On Petition for Certification.<br>Order Denying Petition. |

*To Appellate Division, Superior Court:*

A petition for certification having been submitted to this court, and the court having considered the same,

It is hereupon ordered that the petition for certification is denied, with costs.

WITNESS the Honorable Arthur T. Vanderbilt, Chief Justice at Trenton on the 28th day of March, 1955.

/s/ JOHN H. GILDEA,
Clerk of the Supreme Court.

Filed March 28, 1955.

JOHN H. GILDEA, Clerk.

**(Reported in 18 N. J. 105)**

SUPREME COURT OF NEW JERSEY

| | |
|---|---|
| BOROUGH OF NEPTUNE CITY,<br>Plaintiff-Respondent,<br>*vs.*<br>WILLIAM R. MESTICE,<br>Defendant-Petitioner. | On Petition for Certification to Superior Court, Appellate Division. |

Mr. William R. Mestice, petitioner, in propria persona.

Mr. Joseph R. Megill for the respondent.

March 28, 1955. Denied.

## Judgment Striking Complaint.

(Filed November 29, 1954.)

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION—MONMOUTH COUNTY

No. L-9584-53.

| | |
|---|---|
| WILLIAM R. MESTICE,<br>Plaintiff,<br>*vs.*<br>BOARD OF ADJUSTMENT OF THE BOROUGH OF NEPTUNE CITY, a municipal corporation of the State of New Jersey,<br>Defendant. | Civil Action.<br>Judgment Striking Complaint. |

This matter being opened to the Court by Joseph R. Megill, attorney for the Defendant, in the presence of William R. Mestice, Attorney pro se for the Plaintiff, and motion now being made to strike the complaint on the grounds that the proceeding in lieu of prerogative writ was not commenced within the period prescribed by Subdivision b, Paragraph 3 of R. R. 4:88-15; and the Court having considered the matter and the arguments of counsel for the defendant, and William R. Mestice, Attorney pro se for the Plaintiff, and good cause appearing:

It is, thereupon, on this 19th day of November, 1954, ORDERED that the complaint filed in the above entitled cause be and the same is hereby stricken, with costs to the Defendant.

/s/ FRANK T. LLOYD, JR.,
J. S. C.

## Opinion of Appellate Division.

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

(Reported in 35 N. J. Super. 313)

WILLIAM R. MESTICE,
Plaintiff-Appellant,

*vs.*

BOARD OF ADJUSTMENT OF THE BOROUGH OF NEPTUNE CITY, a municipal corportion of the state of New Jersey,
Defendant-Respondent.

Argued May 9, 1955—Decided May 11, 1955.

Before Judges GOLDMANN, FREUND and CONFORD.

MR. JOSEPH R. MEGILL, attorney for respondent, argued the motion.

No appearance for appellant.

PER CURIAM. Plaintiff appeals from a judgment of the Law Division striking his complaint in lieu of prerogative writ because the action was not commenced within the 30-day period fixed by *R. R.* 4:88-15(*b*) (3) for a review of any decision of a board of adjustment. The appeal must be dismissed.

[1] *R. R.* 1:2-10 requires that in all civil appeals the appellant shall within 30 days after filing notice of appeal deposit with the clerk of the appellate court $100 to answer the costs of the appeal. In default of making such deposit the appeal may, on application of the respondent, be dis-

missed by the appellate court with costs. This rule is made applicable to the Appellate Division by *R. R.* 2:2-5. Notice of appeal to this court was filed December 18, 1954. Plaintiff has not yet deposited the required monies to answer costs. There has been no application for enlargement of time, *R. R.* 1:27*B*, even though plaintiff, as late as March 16, 1955, knew that his appeal was in danger when defendant served its notice of motion to dismiss it for failure to deposit security for costs. There is not even the shadow of a suggestion of excusable neglect here. Plaintiff's failure to deposit security for costs is of a piece with his conduct of the litigation from the very beginning.

There are two other reasons why the appeal should be dismissed, both of them evidenced on the face of the record: (1) plaintiff failed to institute his action in lieu of prerogative writ within time, and (2) he failed to serve his briefs upon defendant's attorney within time. A brief review of the history of the action makes evident these deficiencies.

In 1945 plaintiff bought certain premises on Ridge Avenue, Neptune City, and in 1953 he applied to the zoning board of adjustment for permission to alter them so as to accommodate five families. The local ordinance prohibits the use of a dwelling house by more than one family in the zone where plaintiff's property is located. There was a hearing on the application, resulting in its denial. The resolution of denial was filed in the office of the board of adjustment and notice of the board's action mailed to plaintiff on or about March 20, 1954. Plaintiff admits receipt of this notice on April 9, 1954. Plaintiff then filed a "Notice of Appeal" to the "Law Division, Essex County" on April 17, 1954. An amended notice of appeal to the "Superior Court of New Jersey," entitled "In the Nature of Certification Petitioner Demands Trial *De Novo* by Jury, and Demand of Damages to be Assessed," was filed April 21, 1954. Defendant's motion to strike this "appeal" was granted on

June 11, 1954, the judgment of dismissal stating that the proceeding had not been undertaken in the manner provided by *R. R.* 4:88-3.

On June 17, 1954 plaintiff filed his complaint in lieu of prerogative writ in the Clerk's Office of the Superior Court, service being effected upon defendant that day. Defendant's answer reserved the right to move at or before trial to strike the complaint. Thereafter defendant served and filed its notice of motion to strike the complaint, returnable July 6, 1954, together with affidavits annexed. One of the reasons assigned for striking the complaint was that plaintiff had not commenced his proceeding in lieu of prerogative writ within the 30-day period from the filing of the decision of the local board of adjustment and notice thereof to plaintiff, as required by *R. R.* 4:88-15(*b*) (3). The motion was continued several times. Finally, a new notice of motion to strike, returnable November 19, 1954, was served and filed. On that day judgment striking the complaint was entered on the ground that the action was not commenced within the period prescribed by the cited rule. Plaintiff then obtained an order to show cause why this judgment should not be set aside. The order to show cause was discharged on December 17, 1954.

Plaintiff served his notice of appeal from the judgment striking the complaint on November 23, 1954, and filed it in the Superior Court Clerk's Office on December 18, 1954. *R. R.* 1:7-12(a) requires that "Within 30 days after the filing of the notice of appeal, • • • the appellant shall file with the clerk of the appellate court 12 copies of his brief and serve 3 copies on the attorney of each of the opposing parties." This rule is made applicable to the Appellate Division by *R. R.* 2:7-3, which rule provides that in the Appellate Division only six copies of the brief need be filed with the clerk of the court. The last day on which plaintiff could file and serve his briefs was January 17, 1955, computing

the 30-day period pursuant to *R. R.* 1:27. Plaintiff left his briefs at the office of defendant's attorney by placing them upon his desk at about 9 P. M. on Tuesday, January 18, 1955, when no one was there. They were found there by the attorney when he came to his office the next morning. Defendant thereupon served its notice of motion to suppress plaintiff's brief returnable before this court on February 28, 1955. The grounds stated in the notice were based upon failure to observe the requirements of *R. R.* 1:7-1(a), (b), (c), (d) and (f), and also failure to serve the brief and appendix in accordance with *R. R.* 1:7-12. On March 1, 1955 this court ordered plaintiff's brief suppressed, directed him to file proper and adequate briefs within ten days after entry of the order, and reserved the question of dismissing the appeal for plaintiff's failure to serve his brief upon defendant's attorney within the time prescribed by *R. R.* 1:7-12(a). This was done because the court had before it little more than defendant attorney's oral representation as to how plaintiff served his brief.

[2] We now have before us affidavits by defendant's attorney, his secretary, his associate and his secretary, and the cleaning woman in the office premises, which clearly and uncontrovertably show that plaintiff did not serve his briefs on defendant's attorney or anyone associated with his office during the regular office hours of January 17, 1955, but placed them upon the attorney's desk about 9 P. M. Tuesday evening, January 18, where they were found by the attorney the next morning. Plaintiff filed no affidavit in contradiction. The appeal should therefore be dismissed because of failure to comply with *R. R.* 1:7-12(a). See *R. R.* 1:7-12(c) and *R. R.* 4:5-2 as to the manner of serving briefs.

[3] Plaintiff's failure to institute his action in lieu of prerogative writ within the time required by *R. R.* 4:88-15(b) (3) provides another ground for dismissing the ap-

peal. He filed his complaint on June 17, 1954, 69 days from the date plaintiff admitted having received notice of the denial by the board of adjustment of his application for a variance. Plaintiff made no application for extension of time under *R. R.* 1:27B(2), which permits the court in its discretion to extend the 30-day period for bringing a proceeding in lieu of prerogative writ to review any action of a board of adjustment under *R. R.* 4:88-15(b) (3). But even had he done so, the court could not have enlarged the time by more than 30 days, so that in any event plaintiff was nine days late in instituting his action in lieu of prerogative writ. *In re Pfizer's Estate,* 6 N. J. 233, 239 (1951); *Theresa Grotta Home for Convalescents* v. *Board of Adjustment of Borough of North Caldwell,* 19 N. J. Super. 331, 336-338 (App. Div. 1952).

Dismissal of this appeal puts an end to litigation which, insofar as plaintiff is concerned, has pursued a tortuous course attended by repeated failures to comply with our most fundamental rules of procedure. He failed to appear before us on the return day of the motion to dismiss, this also being the day fixed for hearing argument on the appeal itself. Instead, he addressed a letter to the clerk of the court advising he would not be able to appear, apparently because he had departed or was about to depart for a vacation abroad.

[4] Plaintiff is a layman, but from previous experience before this court we are informed of the fact that he has studied law in preparation for the bar examinations. He has conducted considerable litigation *pro se* in our courts, so that in addition to his studies he has had a rather extensive experience and familiarity with—though obviously no expertness in applying—our rules of procedure. The records of the Clerk of the Superior Court show that since 1948 he has been involved in at least eight actions, in six of which he was plaintiff. He took five appeals to this court,

including the one under consideration, and has appeared before the court on motions on a number of occasions, most or all of them dealing with his failure to observe the rules. Although the court exercises "guarded discretion" to protect a layman and will grant relief in accordance with established principles of law and the facts of a particular case, *Bowman* v. *Bambara*, 28 N. J. Super. 92, 98 (App. Div. 1953), we are not here dealing with a lay person completely unskilled in matters of legal practice. *Borough of Neptune City* v. *Mestice*, 31 N. J. Super. 6, 8 (App. Div. 1954). The court has, on previous occasions, indicated the advisability and need of plaintiff engaging competent counsel to represent him.

It may be observed that although we suppressed plaintiff's original appendix and brief and permitted him to file proper and adequate briefs within ten days of the entry of the order, his present brief does not conform with *R. R.* 1:7-1. Neither the statement of questions involved nor statement of facts is proper, and he cites no legal authority for his argument.

The appeal is dismissed, with costs.

## Mandate on Dismissal.

SUPERIOR COURT OF NEW JERSEY.
APPELLATE DIVISION.
Appeal Docket No. A-185-54.

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| WILLIAM R. MESTICE,<br>Plaintiff-Appellant,<br>*vs.*<br>BOARD OF ADJUSTMENT OF THE BOROUGH OF NEPTUNE CITY, a municipal corporation of the State of New Jersey,<br>Defendant-Respondent. | Civil Action.<br>On Appeal.<br>Mandate on Dismissal. |

This cause having been duly argued before this Court by Joseph R. Megill, counsel for the respondent, and the Court having considered the same,

It is hereupon ordered and adjudged that the Appeal from the judgment of the said Superior Court, Law Division, is dismissed with costs; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless a Notice of Appeal to the Supreme Court or a Notice of Petition for Certification has been filed or is pending, or unless otherwise ordered by this Court and that the record be remitted to the Superior Court, Law Division, to be there proceeded with in accordance with the rules and practice relating to that Court, consistent with the opinion of this Court.

WITNESS the Senior Judge of the Part, Superior Court of New Jersey, Appellate Division, at Trenton on the 11th day of May, 1955.

I. GRANT SCOTT,
Clerk of the Superior Court.

## Order of Dismissal for Failure to Prosecute.

(Original Filed May 20, 1955.)

UNITED STATES DISTRICT COURT

District of New Jersey

Civil Action, File No. 308-55.

William R. Mestice,

Plaintiff,

*v.*

Borough of Neptune City, a Municipal Corporation of the State of New Jersey, and William R. Taylor,

Defendants.

This cause came on for hearing on May 17, 1955, pursuant to defendants' motions, dated May 2, 1955, to dismiss, to strike, and for summary judgment against plaintiff, and due notice thereof having been served upon plaintiff, and David Goldstein, of counsel with Joseph R. Megill, attorney for defendants, having appeared in support of said motions, and plaintiff having failed to appear either pro se or by attorney, and defendants having thereupon moved for dismissal of plaintiff's action because of his failure to prosecute the same, and the Court being duly advised, it is

Ordered, that the above-entitled action be and it is hereby dismissed without prejudice, and with costs to the defendants, for plaintiff's failure to prosecute.

Forman,
C. D. J.

Dated: May 20, 1955.

## Order Denying Plaintiff's Motions of October 1, 1955.

(Original Filed October 21, 1955.)

UNITED STATES DISTRICT COURT.
DISTRICT OF NEW JERSEY.

Civil Action, File No. 308-55.

WILLIAM R. MESTICE,

Plaintiff,

*v.*

BOROUGH OF NEPTUNE CITY, a Municipal Corporation of the State of New Jersey, and WILLIAM R. TAYLOR,

Defendants.

This cause came on for hearing on October 17, 1955, pursuant to plaintiff's motions, dated October 1, 1955, and plaintiff's accompanying notice of motions, dated October 1, 1955, for an order to set aside the "Order for Dismissal for Failure to Prosecute," dated May 20, 1955 and duly entered May 23, 1955, and for a further order for the issuance of a certificate of occupancy, as set forth in plaintiff's said motions and notice thereof; and plaintiff having appeared pro se on October 17, 1955, in support of his said motions, and Joseph R. Megill, attorney for the defendants, and David Goldstein, of counsel with said Joseph R. Megill, having thereupon appeared in opposition to plaintiff's said motions, and having filed their written opposition thereto, dated October 7, 1955; and the Court having thereupon heard and considered the arguments in support and in opposition to plaintiff's said motions, and being thereupon fully advised, it is

ORDERED, that plaintiff's motions of October 1, 1955, be and they are hereby denied, with costs to the defendants.

FORMAN,
C. D. J.

Dated: October 21, 1955.

## Opinion.

(Filed December 14, 1955.)

UNITED STATES DISTRICT COURT.

FOR THE DISTRICT OF NEW JERSEY.

WILLIAM R. MESTICE,
Plaintiff,

*vs.*

BOROUGH OF NEPTUNE CITY, a Municipal Corporation of the State of New Jersey, and WILLIAM R. TAYLOR,
Defendants.

Appearances:

JOSEPH R. MEGILL,
Attorney of Defendants,

DAVID GOLDSTEIN,
Of Counsel,
For the Motion.

WILLIAM R. MESTICE, *pro se*,
*Contra.*

FORMAN, *C. J.*:

The complaint in this case was drawn by the plaintiff himself. It is quite evident that it is not the work of a lawyer. It is prolix, redundant and violative of many of the rules of pleading. It opens with a recital of various excerpts from the Constitution and statutes of the United States and New Jersey, and rules of court of New Jersey and alleges that the Supreme Court of New Jersey erred

in holding in favor of the defendants herein and in ignoring plaintiff's prayers which resulted in depriving plaintiff of his property without due process of law and denied the plaintiff the equal protection of the laws.

Then follows the first count in which the plaintiff, among others, makes the following salient allegations:

That in October of 1945 he acquired from the defendant Borough of Neptune City, by way of tax sale, title to the premises known as 120 Ridge Avenue upon which there was a dwelling built 35 or 40 years ago, which had a kitchen on the first floor and another on the second floor where a hot water boiler was located;(1)

That shortly thereafter, in November of 1945, the defendant, Borough of Neptune City, hereinafter called the municipality, enacted a comprehensive zoning ordinance;(2)

That thereafter plaintiff reconstructed the dwelling into a five apartment house upon specific permit granted by the defendant, William R. Taylor, Building Inspector of the

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(1) During the course of argument plaintiff intimated that prior to its abandonment for failure to pay taxes it had been occupied as a two-family house.

(2) A copy of the ordinance was submitted to the court after argument and it contains the following relevant provisions:

"3. REGULATIONS CONTROLLING ZONES

"a. In Residence Zone A, no building shall be erected or used except for a one-family private dwelling . . ."

* * *

"21. ENFORCEMENT AND PENALTIES

"The ordinance shall be enforced as hereinafter provided and by the Building Inspector who is empowered to cause any building, structure, plan or premises to be inspected and examined and to order in writing the remedying of any condition found to exist therein or thereat in violation of any provision of these regulations. The owner of a building or premises where a violation of any provision of said regulations shall have been committed or shall exist, or the lessee or tenant of any part of the building or premises in which such violation shall have been committed or shall exist, or the agent, architect, builder, contractor, or any other person who shall commit, take part or assist in any such violation or who shall maintain any building or premises in which any violation of the ordinance shall exist shall for each and every violation upon conviction be imprisoned in the Monmouth County Jail for a period not exceeding thirty days or be fined not exceeding Two Hundred ($200.00) Dollars or both. Each day that a violation is permitted to exist shall constitute a separate offense.

defendant municipality, and that the plans for the alterations were approved by the defendant municipality's Mayor, Council and Board of Adjustment;

That the premises as altered were ready for occupancy in June 1949, at which time plaintiff applied to defendant Taylor for a certificate of occupancy and paid a fee of $2.00;

That defendant Taylor never issued the certificate but authorized plaintiff to rent the first floor of the premises until the Mayor and Council "would have advised to rent the remaining part of the building";

That on the complaint of defendant Taylor, a warrant was issued by the defendant municipality's magistrate, and plaintiff was arrested on August 25, 1953 and held in $5,000 bail (which he furnished) to await a hearing on a charge of violating the defendant municipality zoning ordinance of November 26, 1945, as amended in March of 1953, in that he constructed a multiple-family house in a one-family residential zone;

That on October 1, 1953, at a hearing before the said magistrate, plaintiff demanded a trial by jury and made the following "motions", namely, that the complaint was defective in that he had purchased the premises prior to the passage of the zoning ordinance; that the "premises" were built 40 years ago with a kitchen on the first floor and another on the second floor where the hot water boiler was located; that there were no restrictions of record; that plaintiff, shortly thereafter in November of 1945, had submitted a plan for five kitchens and three baths which were approved as aforesaid;

That plaintiff testified at the hearing concerning his application for a certificate of occupancy to the defendant Taylor; approval of plumbing and electrical work and that plaintiff demanded dismissal of the proceedings on the ground that the magistrate had no jurisdiction in the matter

and that it should have been treated as a civil action in the Superior Court of New Jersey;

That on October 6, 1953, the magistrate found the plaintiff guilty and imposed a fine of $200 upon him;

That plaintiff immediately appealed from the sentence to the Monmouth County Court where no trial de novo was permitted and wherein plaintiff was denied the right to be heard by a jury and his day in court.

As a result, plaintiff demanded in count 1, an injunctive order restraining defendants from interfering in the renting of his premises to prospective tenants and to stay all proceedings in the courts of New Jersey pending further determination and disposition by this court or in the alternative for an order directing the defendants to issue a certificate of occupancy forthwith.

In the second count of the complaint the plaintiff incorporates the allegations of the first count and demands $20,000 as damages against the defendants for "vandalism, loss of rentals and other remedial damages" to be assessed by a jury.

In the third count the plaintiff incorporates the allegations of the first and second counts and further alleges that the defendants are jointly and severally liable for the "falsely alleged Complaint, and Warrant for his Arrest" in violation of the Federal Constitution and of R. S. 55:11-6;(3) that his release on $5,000 bail was contrary to the Federal and New Jersey Constitutions; that the courts of New Jersey violated plaintiff's rights under the Four-

(3) "Every county district court and municipal court shall have jurisdiction of proceedings for the collection and enforcement of a penalty imposed because of the violation, within the territorial jurisdiction of the court, of any provision of this subtitle. The penalty shall be collected and enforced in summary proceedings pursuant to the Penalty Enforcement Law (N. J. S. 2A:58-1 et seq.). Process shall issue at the suit of the Bureau of Tenement House Supervision, either in the nature of a summons or warrant; but no warrant shall issue against any freeholder unless affidavit shall also first be made that such freeholder is about to abscond from this State." N. J. S. A. 55:11-6.

teenth Amendment of the Constitution of the United States, as well as the Constitution of New Jersey in denying him equal protection of the law after he had brought to their attention the attempt by the defendant municipality to create a crime in violation of an ordinance which was void and illegal; plaintiff demands as damages the sum of $300,000 against the defendants for having "maliciously abused, insulted, molested and underprivileged" him.

In the fourth count the plaintiff incorporates the allegations of the first, second and third counts, and alleges the illegality of the zoning ordinance of the defendant municipality and further alleges that he has demanded that the said ordinance "be set aside, abrogated, and for nothing holden" as being "illegal, ultra vires, unconstitutional, and against public policy," but that the said courts have ignored his prayers. Plaintiff demands $400,000 as remedial and punitive damages against the defendants for enacting the said zoning ordinance which has brought upon him "defamation of character, humiliation, and ridiculous and defamatory publications, with abuses of process and without any probable, or reasonable cause."

The record discloses that the appeal to the Monmouth County Court was dismissed as being out of time and that dismissal was affirmed. *Neptune City* v. *Mestice*, 31 N. J. Super. 6 (App. Div. 1954); cert. denied, 18 N. J. 105 (1955).

Plaintiff has also tried to secured a variance under N. J. Rev. Stat. 40:55-39(d) which would permit him to use his premises for occupancy by more than one family. However, the Board of Adjustment of Neptune City denied him relief, and his appeal to the Superior Court, Law Division, from this denial was also dismissed as out of time. This dismissal has been affirmed. *Mestice* v. *Bd. of Adjustment of Neptune City*, 35 N. J. Super. 313 (App. Div. 1955).

In the first introductory paragraph to count 1 of the complaint plaintiff mentions a reference to "U. S. C. A.,

Title 8, Chapter 3, on Civil Rights; Section 41, which deals on Equal Rights Under the Law; Section 43; Section 45;(4) * * *." Alerted by this signal a search was made throughout the complaint for substantive charges of deprivations contemplated by the Civil Rights Act but none was found other than the oblique citation of the statute.

Plaintiff complains also that the proceedings against him before the magistrate were invalid in that there was no jurisdiction since "the matter had to be treated as a Civil Action in the Superior Court of New Jersey and not as a criminal action in defendant's court."

The New Jersey Statute, N. J. Rev. Stat. 40:55-47 authorizes municipalities to "provide by ordinance for the enforcement" of zoning regulations. The defendant municipality incorporated such an enforcement provision in its zoning ordinance. The New Jersey Supreme Court recently commented upon such public wrongs in the case of *Sawran et al.* v. *Lennon et al.*, N. J. , (Nov. 21, 1955) in the following language:

> "There is considerable confusion in our law, both statutory and decisional, as to the nature of the various kinds of public wrongs which fall short of constituting crimes and as to the sanctions by which law seeks to prevent them, on the one hand, and crimes on the other. Crimes are readily distinguished from all other public offenses by the fact that indictment by a grand jury is a constitutional prerequisite to proceedings to punish the defendants therefor, *Const. 1947,* Art. I, § 8, as is trial by jury, *idem.* Art. I, §9, unless waived by the defendant, but the classes of offenses against the public other than crimes differ markedly from each other. Thus disorderly conduct, N. J. S. A. 2A:169-1 to 2A:170-96,

(4) Now found in 42 U. S. C. § 1981 et seq.

a class of offenses which has grown extensively over the years, *State* v. *Maier*, 13 N. J. 235 (1953) (especially II, pp. 251-260) has always been deemed quasi-criminal in nature but not strictly criminal, and is punishable summarily without indictment or trial by jury by *fines* or imprisonment, or both. These offenses find their origin in statutes as above set forth, or in ordinances adopted pursuant to statute, *Paul* v. *Gloucester*, 50 N. J. L. 585 (E. & A. 1888); *Sherman* v. *Patterson*, 82 N. J. L. 345 (E. & A. 1912); *Fred* v. *Mayor and Council, Old Tappan Borough*, 10 N. J. 515, 519 (1952); McQuillan, *Municipal Corporations* (3rd ed.), Vol. 6, Chaps. 23, 24."

The proceeding before the magistrate involving the plaintiff in this zoning violation is similar. Moreover, he was held liable only for the penalty part of the punishment prescribed and therefore was not prosecuted for or convicted of any crime. Hence his complaint that the proceeding against him was without jurisdiction lacks merit.

It is also claimed that denial of plaintiff's demand for jury trial in the state courts was constitutional error. But New Jersey has ruled that trial by jury is not available to those accused of zoning violations, *Montclair* v. *Stanoyevich*, 6 N. J. 479 (1951), and it is a fundamental principle of constitutional law that nothing in the Federal Constitution prohibits a state from denying that right in those situations where it sees fit to do so. *Walker* v. *Sauvinet*, 92 U. S. 90 (1876).

The complaint is before the court upon the motions of the defendants to dismiss.

Obviously, there is no jurisdiction in the court to enter counts 2 and 3 or so much of count 4 except as plaintiff demands therein that the ordinance be declared invalid by reason of infringement of his rights under the Federal Constitution.

*Opinion.*

The burden of count 1 and such part of count 4 as is cognizable here is an attack upon the defendant municipality's zoning ordinance. The constitutionality of zoning itself long since has been upheld, *Euclid* v. *Ambler Co.*, 272 U. S. 365 (1926).

The New Jersey Constitution of 1947, as did the Constitution of 1844,[5] empowers the legislature to delegate zoning power to municipalities, N. J. Const. 1947, Art. IV, § 6, Paragraph 2, and the legislature has exercised this power by passing a zoning enabling act, N. J. Rev. Stat. 40:55-30 et seq., under which the defendant municipality has been granted ample power to create use zones. To attack an ordinance as invalid on its face attempts to revive long settled issues and is utterly without merit.

The complaint also alleges that the ordinance was applied to the plaintiff unconstitutionally because he had secured a building permit under which he was allowed to make the alterations, the later use of which led to the proceeding for violation of the zoning ordinance. Under the New Jersey cases, however, the erroneous issuance of a building permit is no bar to a later revocation of the permit or proceedings for violations of the zoning law for operating under it. *Sea Isle City* v. *Vinci*, 34 N. J. Super. 273 (Cape May County 1955); *Borough of Rockleigh* v. *Astral Industries*, 29 N. J. Super. 154 (App. Div. 1953); *Adler* v. *Dept. of Parks, Irvington*, 20 N. J. Super. 240 (App. Div. 1952).

The officer issuing a building permit has no authority to permit variances from the zoning law. That is a function delegated exclusively to the Board of Adjustment and the governing body of the municipality. N. J. Rev. Stat. 40:55-39. Plaintiff's complaint alleges that the governing body as well as the issuing officer approved his application for a building permit. This would be highly unusual pro-

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(5) As amended October 18, 1927, in Article IV, § 6, Par. 5.

cedure, but assuming its truth, plaintiff is still not aided, for the governing body has no authority to permit variations from the zoning scheme by legislative action. Its power to authorize variances exists only when it is acting in an administrative capacity passing on recommendations of the Board of Adjustment that a variance be granted. *Borough of Cresskill* v. *Borough of Dumont*, 15 N. J. 238, 249 (1954); *Conlon* v. *Board of Public Works, Paterson*, 11 N. J. 363 (1953); *Oliva* v. *City of Garfield*, 1 N. J. 184, 189 (1948).

Furthermore, plaintiff is not helped, as he contends, by N. J. Rev. Stat. 40:55-48(6) which forbids retroactive zoning in New Jersey and permits nonconforming uses that existed prior to the advent of zoning to continue unmolested, *United Advertising Corp.* v. *Borough of Raritan*, 11 N. J. 144, 152 (1952). The nonconforming use permitted to continue is the identical use that existed prior to the enactment of the zoning ordinance. Any enlargement of that use must be by variance. *H. Behlen & Bros.* v. *Mayor, etc., Town of Kearny*, 31 N. J. Super. 30, 38 (App. Div. 1954) and cases cited therein. The use to which plaintiff's property was put just prior to the enactment of the zoning ordinance of the defendant municipality was at most occupancy by two families in facilities designed for one-family use. Without prejudging a situation wherein the defendants might attempt to prevent occupancy of plaintiff's premises again by two families under those precise circumstances, it is plain that the prior use does not give him present rights to nonconforming occupancy by five separate housekeeping units. Occupancy by five separate families instead of by two families living in a one-family facility is obviously an illegal expansion of a nonforming

(6) "Any nonconforming use or structure existing at the time of the passage of an ordinance may be continued upon the lot or in the building so occupied and any such structure may be restored or repaired in the event of partial destruction thereof." N. J. S. A. 40:55-48.

use. See *Borough of Rockleigh* v. *Astral Industries, supra; Monmouth Lumber Co.* v. *Ocean Township,* 9 N. J. 64 (1952); *Brandt* v. *Zoning Board of Mt. Holly Township,* 16 N. J. Super. 113 (App. Div. 1951); *State* v. *Casper,* 5 N. J. Super. 150 (App. Div. 1949).

In effect, the plaintiff charges in his complaint that the actions of certain officials of the defendant municipality now estop it from preventing him from putting his premises to a nonconforming use. Those actions consist, as he alleges of (1) the granting of a building permit by the defendant Taylor; (2) approval of the building plans by the said defendant Taylor, and the defendant municipality's Mayor, Council and Board of Adjustment; (3) approval of electrical wiring and plumbing by respective inspectors; (4) assertions by the defendant Taylor that plaintiff should proceed to rent the first floor of the premises pending permission of the Mayor and Council to use the balance of the house. Granting the truth of these allegations, as indeed the court must on this motion, and considering them together with the fact that plaintiff has now been forbidden to use his premises for other than one-family occupancy, no violation of the principle of equal protection of the laws is shown. A variance from the existing zoning ordinance can only be obtained through pursuit of the prescribed administrative procedure. N. J. Rev. Stat. 40:55-39. None of the above named actions amounted to that procedure, nor could they insulate the plaintiff from the necessity of subjecting himself to it. The defendant municipality cannot be by them estopped from exacting fulfillment of the requirements of that administrative procedure. Everyone, including the plaintiff, is subject to these requirements, and all, even those armed with a permit from the building inspector and other approvals, as alleged in this case, are subject to them. Due process arguments are likewise without merit for it can hardly be con-

tended that the right of the citizen to rely on the purported authority granted by administrative officials inconsistent with the law is one so fundamental that it is beyond the power of the state to abrogate. Hence, no basis is laid in this complaint for relief in this court on the theory that constitutional rights of the plaintiff have been infringed by the actions of the defendants.

A reading of the complaint as a whole reveals that it is the concept of the plaintiff that being aggrieved by decisions of the New Jersey courts his redress is by way of appeal to this court. Of course, the power of this court is limited by the Constitution and laws of the United States so that it does not embrace such a remedy.

Accordingly, the motion to dismiss the complaint is granted.

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## Order Dismissing Plaintiff's Complaint.

(Original Filed January 16, 1956.)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action, File No. 1021-55.

WILLIAM R. MESTICE,

Plaintiff,

*v.*

BOROUGH OF NEPTUNE CITY, a Municipal Corporation of the State of New Jersey, and WILLIAM R. TAYLOR,

Defendants.

This cause came on for hearing on November 21, 1955, pursuant to defendants' motions and notice of hearing

thereof, dated November 7, 1955; and said motions and due notice thereof having been duly and timely served upon plaintiff; and Joseph R. Megill, attorney for defendants, and David Goldstein, of counsel with said Joseph R. Megill, having appeared and argued in support of said motions, and plaintiff having appeared pro se and argued in opposition thereto; and the Court having thereupon taken the matter under advisement and having thereafter rendered its decision, as set forth in the opinion, per Forman, C. J., now on file herein, granting defendants' motion to dismiss plaintiff's complaint, for the reasons set forth in said opinion;

And due notice of a subsequent motion by the defendants, returnable January 3, 1956, to settle the form of order dismissing plaintiff's complaint having been duly served upon plaintiff on December 19, 1955, as appears from the affidavit of mailing on file herein; and said motion having been duly adjourned to January 16, 1956, at the request of plaintiff; and Joseph R. Megill, attorney for defendants, and David Goldstein, of counsel with said Joseph R. Megill, having appeared before the court on January 16, 1956 in support of said motion, and plaintiff having appeared pro se in opposition thereto; and the Court being duly advised,

IT IS HEREBY ORDERED, that defendants' motion to dismiss plaintiff's complaint be and it is hereby granted, and that plaintiff's complaint be and it is hereby dismissed with prejudice and with costs to the defendants, upon the grounds and for the reasons set forth in the Court's opinion hereinabove referred to.

FORMAN,
C. D. J.

Dated: January 16, 1956.

## Order.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT.

No. 11,889.

WILLIAM R. MESTICE,

*vs.*

BOROUGH OF NEPTUNE CITY, a municipal Corporation of the State of New Jersey, and WILLIAM R. TAYLOR.

Present:

BIGGS, Chief Judge, and McLAUGHLIN and STALEY, Circuit Judges.

Upon consideration of the motion by plaintiff for leave to docket the appeal and file the record out of time, and of the brief in support thereof; and of the motion by defendants to dismiss the appeal as untimely, and of the memorandum in support thereof; and after full hearing;

Is is ORDERED that the motion for leave to docket the appeal and file the record out of time be, and it is hereby denied;

And it is further ORDERED that the case be docketed in this court and that the appeal be, and it is hereby dismissed.

Dated: April 12, 1956.

By the Court,
BIGGS,
Chief Judge.

**Sur Petition for Rehearing.**

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT.

No. 11,889.

WILLIAM R. MESTICE,
Appellant,

*vs.*

BOROUGH OF NEPTUNE CITY, a municipal Corporation of the State of New Jersey, and WILLIAM R. TAYLOR.

Present:

BIGGS, Chief Judge, and MCLAUGHLIN and STALEY, Circuit Judges.

After due consideration the petition for rehearing in the above-entitled case is hereby denied.
Dated: May 11, 1956.

By the Court,
BIGGS,
Chief Judge.